COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-1405

COMMONWEALTH

vs.

ALEXIS GIANNINI.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Alexis Giannini, appeals after a jury verdict in the District Court finding her guilty of operating under the influence. G. L. c. 90, § 24(1)(a)(1). She alleges error in the jury instructions. We affirm.

Background. We recite the facts as the jury may have found them, and as they pertain to this appeal. The defendant was found by the police to be sleeping in her car in the parking lot of a convenience store at approximately 2:30 A.M. on July 12, 2012.[1] The car's keys were in the ignition and the engine was on, but the transmission was in park. The officer smelled alcohol on the defendant, noticed that her eyes were glassy and red, and observed vomit inside the car and on the defendant. The officer then conducted three field sobriety tests, two of

[1] The car was stopped in the middle of one of the entrances to the parking lot.

which the defendant failed.[2] The defendant was placed under arrest and brought to the police station where she consented to a breath test. The two test results indicated blood alcohol levels of 0.152 percent and 0.156 percent.

Public way instruction. Operating under the influence requires a showing that the defendant was on a public way, "or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees." G. L. c. 90, § 24(1)(a)(1), as amended by St. 1982, c. 373, § 2. After the close of evidence, the judge gave the following jury instruction with respect to the relevant theory:[3]

> "The third alternative is a place to which members of the public have access as invitees or licensees. The difference between invitees and licensees is not important here. Both are persons who are lawfully in a place at the invitation of the owner or at least with the owner's tolerance. Some examples of locations where the public has access as invitees or licensees would include shopping centers, roadside fuel stops parking lots, restaurant parking lots. So if it is proved, beyond a reasonable doubt, that the defendant operated a motor vehicle in any of these areas then this element of the offense had been proved" (emphasis added).

[2] The defendant was able to recite the alphabet from A to Z, but she did not perform the one-legged stand or the nine-step walk and turn to the officer's satisfaction.

[3] In the instant case, the relevant theory is whether members of the public had access to the parking lot as invitees or licensees.

The defendant argues that the judge's use of the phrase, "in any of these areas," "directed the jury to find the public way element met simply upon a finding that [the defendant] was found in a parking lot." She asserts that this instruction impermissibly mirrored the evidence introduced by the Commonwealth and deprived the jury of their ability to deliberate. See, e.g., Commonwealth v. Cavallaro, 25 Mass. App. Ct. 605, 610 (1988).

However, the defendant fails to take into consideration the first part of the instruction.[4] We "view the charge in its

[4] The first part of the judge's instruction states:

> "The next element I will instruct you on is the element of public way. . . . The Commonwealth must prove, beyond a reasonable doubt, that the defendant operated a motor vehicle in one of three places: on a public way or in a place to which the public has a right of access or in a place to which members of the public have access as invitees or licensees. You will note that the statute treats these three types of places as alternatives. If any one of the alternatives is proved beyond a reasonable doubt then this element of the offense is satisfied; and I'll go through the alternatives. A public way is defined as a public highway or a private way that is laid out under authority of a statute or a way dedicated to public use or a way that is under the control of a park commission or a body having similar powers. The interstate and state highways as well as municipal streets and roads would all be included in this definition. In determining whether a road is a public way you may consider whether it has some of the usual indications of a public way. For example, whether it's paved; whether there are street light[s], street signs, traffic signals, curbing, fire hydrants; whether there are abutting houses or businesses; whether it has any crossroads intersecting it; whether it's publicly maintained; and whether there is an absence of signs

entirety since the adequacy of instructions must be determined in light of their over-all impact on the jury." Commonwealth v. Drew, 397 Mass. 65, 82 (1986). Taken in context,[5] the judge here instructed the jury that to prove that a parking lot is a public way, the Commonwealth must show that there was a "reasonable expectation among members of the public that they were welcome to operate their vehicles in the parking lot." Commonwealth v. Kiss, 59 Mass. App. Ct. 247, 250 (2003). There was no error.

Speculation instruction. The defendant also asserts that the judge impermissibly denied the defendant's ability to pursue a so-called Bowden defense, Commonwealth v. Bowden, 379 Mass. 472, 485-486 (1980),[6] by instructing the jury not to speculate about facts not in evidence. The instruction given by the judge is a standard directive,[7] relating to jurors' speculation that

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prohibiting public access. The second alternative under the statute is a place that is not a way, but where the general public still has a right of access by motor vehicle. This might include, for example, a parking lot that's adjacent to City Hall or the parking area of a public park."

[5] The defendant's failure to object to this language supports the conclusion that the charge, as it was delivered to the jury, did not present the listener with a conclusory definition requiring a finding of guilty but, rather, was a proper description of one example of a public way.

[6] The defendant complains that the officer did not take the defendant's temperature prior to administering the breath test. The officer testified that the breathalyzer was "tremendously" temperature sensitive. See Commonwealth v. Bowden, 379 Mass. at 485-486.

[7] The judge's instruction, in pertinent part, stated: "You are not to decide this case based on what you may have read or seen

may be prompted by counsel's success during trial in objecting to evidence.

The instruction was proper; moreover it did not prevent the defendant from introducing evidence that the Commonwealth's use of a breathalyzer produced a flawed result because the defendant allegedly had a fever. The defendant explored this topic during cross-examination of the officer who administered the breath test, and the record contains no suggestion that the defendant was prevented from introducing evidence, including additional evidence on this point, during the presentation of her case.

Judgment affirmed.

By the Court (Grainger, Hanlon & Agnes, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: January 7, 2016.

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or heard outside the courtroom. You are not allowed to engage in any guesswork about any unanswered questions that remain in your mind, or to speculate about what the real facts might or might not have been if they were not admitted into evidence in this case." See Commonwealth v. Tolan, 453 Mass. 634, 652 (2009).

[8] The panelists are listed in order of seniority.